



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

---

Mailed and Filed: FEBRUARY 14, 2023

IN THE MATTER OF:

Appeal Board No. 626642

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed October 28, 2022 (), the Administrative Law Judge overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked for a retail store as a full-time sales supervisor for four months until January 24, 2022. On December 5, 2021, the claimant came to work for her 6:00 am shift. Another supervisor was training a new supervisor on opening the store. The claimant became frustrated because she was not specifically trained by the employer on how to open the store. With the new supervisor present, the claimant and the other supervisor had a verbal dispute in the office which continued onto the sales floor wherein the

claimant cursed. After the disagreement, the claimant regained her composure, admitted that she was at fault, and apologized to the supervisor. The claimant received a warning after the incident. The warning indicated "With a trainee present this is not an example of directing, motivating or leading by example."

On January 14, 2022, the claimant noticed only one cashier at the register and multiple customers waiting in line to be checked out. She observed a cashier and another supervisor walking out from the backroom laughing. The claimant asked the supervisor if she could speak with her privately. While they were speaking in an enclosed office, the claimant raised her voice because the cashier and the supervisor were not assisting customers. The claimant did not flail her arms, roll her eyes, or use profanity during the conversation and no customers were present. Following an investigation, the employer discharged the claimant because it concluded that she raised her voice, flailed her arms, rolled her eyes, and used profanity towards the supervisor.

OPINION: The credible evidence establishes that the employer discharged the claimant because it concluded that she had raised her voice, flailed her arms, rolled her eyes, and used profanity towards the supervisor. We credit the claimant's firsthand testimony that she only raised her voice over the employer's hearsay evidence to the contrary. We note that the previous warning involved an argument in front of a new trainee wherein the claimant cursed. However, during the January 14 incident, no coworkers or customers were present, and profanity was not used. Given the context of the January 14 incident, the claimant could not have reasonably anticipated that she would be fired from her employment (See *Matter of Irons*, 79 AD3d 1511 [3d Dept 2010]; see also *Matter of Rahaman*, 101 AD3d 1206, [3d Dept 2012]). Accordingly, we conclude that the claimant's actions on January 14, 2022 amounted to poor judgment and do not constitute misconduct for unemployment insurance purposes.

DECISION: The decision of the Administrative Law Judge is affirmed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the

claimant by such employer should not count in determining whether the claimant files a valid original claim in

the future, is overruled.

The initial determination, holding the claimant eligible to receive benefits, is sustained.

The claimant is allowed benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER